

MEMORANDUM

TO: Whom This Concerns

FROM: Kevin C. McDowell, General Counsel

RE: Relationship of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to the Family Educational Rights and Privacy Act (FERPA)

DATE: April 10, 2003

The Indiana Department of Education has received a number of inquiries regarding the possible application of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to publicly funded elementary and secondary schools. HIPAA was passed by Congress in 1996 to improve “the efficiency and effectiveness of the healthcare system” through, *inter alia*, standardization of health-related transactions, enhanced privacy and security of health information, and greater access by persons to their health-related information. During the course of the extended rule-making process for this expansive law, the emerging terms and definitions designed for HIPAA purposes appeared to include certain school-based personnel and records. The relationship of HIPAA to other federal privacy laws was likewise unclear, particularly with respect to the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g as implemented through 34 CFR Part 99.

Clarification from several sources now make it sufficiently clear that education records maintained by publicly funded schools in Indiana are subject to the FERPA privacy requirements and not the HIPAA privacy restrictions. This would include health-related information maintained in a student’s education record. However, certain transactions that some public schools engage in may very well have to comply with HIPAA requirements (see below).

EDUCATION RECORDS GENERALLY

The Family Policy Compliance Office (FPCO), established by 34 CFR §§ 99.60-99.67, is charged with ensuring compliance with FERPA. The FPCO, in response to the relationship between FERPA and HIPAA, stated:

This Office has not published any guidance on the applicability of FERPA to HIPAA. However, we worked closely with the Department of Health and Human Services (HHS) on this issue during the rulemaking process. Because FERPA affords students adequate privacy protections, the Government agreed that records that are protected

by FERPA should not be subject to HIPAA.

The HIPAA final rule—45 CFR Parts 160 & 164; *Standards for Privacy of Individually Identifiable Health Information*; **Federal Register**, Thursday, December 28, 2000—explains that records that are subject to FERPA are not subject to HIPAA. Additionally, medical records that are excepted from FERPA's definition of “education records” under section 99.3 are also exempted from coverage by HIPAA. See page 82483 of the December 28, 2000, **Federal Register** document on the HIPAA final rule.¹

FERPA’s definition of “education record” is fairly straight-forward.

§ 99.3 What definitions apply to these regulations?

* * *

Education records.

(a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.²

The education record will contain both directory and personally identifiable information with respect to a student. Both “directory” and “personally identifiable” information are defined further at § 99.3. An Indiana elementary and secondary public school, as a recipient of federal funds for education, is required by FERPA to ensure that personally identifiable information from a student’s education record is not disclosed improperly; that a parent (or a student who is 18 years of age or older) have access to the student’s education record; that a parent (or eligible student) receive notice of rights under FERPA; and that there be a process whereby a parent (or

¹This statement by the FPCO is not available at the FPCO’s public on-site library at <http://www.ed.gov/offices/OM/fpc/ferpa/library.html>. It is presently available at www.ed.gov/offices/OM/fpc/philipburlingame .

²Compare Indiana’s statutory counterparts at I.C. 20-8.1-3-17.5 (required contents of high school transcripts, including certain health-related information) and I.C. 20-10.1-22.4-1 (defining “education records” as meaning information recorded by a public school that concerns a student who is or was enrolled in the school). See also 511 IAC 4-1.5-3, specifically incorporating FERPA’s requirements as Indiana standards for the maintenance, retention, and destruction of education records of publicly funded schools.

eligible student) can challenge the contents of the student's education record. These are deemed sufficient privacy safeguards such that HIPAA will not apply.³

The FPCO referred to the publication of 45 CFR Parts 160 and 164, the final rules of the Department of Health and Human Services (HHS) for implementing that part of HIPAA addressing the Standards for Privacy of Individually Identifiable Health Information. **Federal Register**, Vol. 65, No. 250, beginning at p. 82461 (December 28, 2000). In a lengthy preamble to the Final Rules, HHS included a section entitled "Relationship to Other Federal Laws." One section dealt exclusively with HIPAA's relationship to FERPA. The following excerpt is from this section of the preamble.

FERPA, as amended, 20 U.S.C. 1232g, provides parents of students and eligible students (students who are 18 or older) with privacy protections and rights for the records of students maintained by federally funded educational agencies or institutions or persons acting for these agencies or institutions. We have excluded education records covered by FERPA, including those education records designated as education records under Parts B, C, and D of the Individuals with Disabilities Education Act [IDEA] Amendments of 1997,⁴ from the definition of protected health information. For example, individually identifiable health information of students under the age of 18 created by a nurse in a primary or secondary school that receives federal funds and that is subject to FERPA is an education record, but not protected health information. Therefore, the privacy regulation does not apply. We followed this course because Congress specifically addressed how information in education records should be protected in FERPA.

We have also excluded certain records, those described at 20 U.S.C. 1232g(a)(4)(B)(iv), from the definition of protected health information because FERPA also provided a specific structure for the maintenance of these records. These are records (1) of students who are 18 years or older or are attending post-secondary educational institutions, (2) maintained by a physician, psychiatrist, psychologist, or recognized professional or paraprofessional acting or assisting in that capacity, (3) that are made, maintained, or used only in connection with the provision of treatment to the student, and (4) that are not available to anyone, except a physician or appropriate professional reviewing the record as designated by the student. Because FERPA excludes these records from its protections only to the extent they are not available to anyone other than persons providing treatment to students, any use or disclosure of the

³HIPAA's privacy requirements are concerned with "protected health information." FERPA is concerned principally with "personally identifiable information."

⁴The pertinent federal regulations in this regard can be found at 34 CFR §§ 300.560-300.577 and 511 IAC 7-23 *et seq.* (Confidentiality of Information).

record for other purposes, including providing access to the individual student who is the subject of the information, would turn the record into an education record. As education records, they would be subject to the protections of FERPA.

These exclusions are not applicable to all schools, however. If a school does not receive federal funds, it is not an educational agency or institution as defined by FERPA. Therefore, its records that contain individually identifiable health information are not education records. These records may be protected health information. The educational institution or agency that employs a school nurse is subject to our regulation as a health care provider if the school nurse or the school engages in a HIPAA transaction.

While we strongly believe every individual should have the same level of privacy protection for his/her individually identifiable health information, Congress did not provide us with authority to disturb the scheme it had devised for records maintained by educational institutions and agencies under FERPA. We do not believe Congress intended to amend or preempt FERPA when it enacted HIPAA.

With regard to the records described at 20 U.S.C. 1232g(a)(4)(B)(iv), we considered requiring health care providers engaged in HIPAA transactions to comply with the privacy regulation up to the point these records were used or disclosed for purposes other than treatment. At that point, the records would be converted from protected health information into education records. This conversion would occur any time a student sought to exercise his/her access rights. The provider, then, would need to treat the record in accordance with FERPA's requirements and be relieved from its obligations under the privacy regulation. We chose not to adopt this approach because it would be unduly burdensome to require providers to comply with two different, yet similar, sets of regulations and inconsistent with the policy in FERPA that these records be exempt from regulation to the extent the records were used only to treat the student.⁵

As with all federal regulations, proposed rules are published and circulated for comment. Numerous comments were received, especially regarding the relationship between FERPA and HIPAA. The following are published responses by HHS to comments it received regarding FERPA.⁶

“Education Records” versus “Protected Health Information”

Comment: A few commenters supported the exclusion of “education records” from the

⁵**Federal Register**, Vol. 65, No. 250 at p. 82483.

⁶**Federal Register**, Vol. 65, No. 250, at pp. 82595-96. Head notes have been added.

definition of “protected health information.” However, one commenter requested that “treatment records” of students who are 18 years or older attending post-secondary education institutions be excluded from the definition of “protected health information” as well to avoid confusion.

Response: We agree with these commenters. See “Relationship to Other Federal Laws” for a description of our exclusion of FERPA “education records” and records defined at 20 U.S.C. 1232g(a)(4)(B)(iv), commonly referred to as “treatment records,” from the definition of “protected health information.”

Health Information Generally

Comment: One comment suggested that the regulation should not apply to any health information that is part of an “education record” in any educational agency or institution, regardless of its FERPA status.

Response: We disagree. As noted in our discussion of “Relationship of Other Federal Laws,” we exclude education records from the definition of protected health information because Congress expressly provided privacy protections for these records and explained how these records should be treated in FERPA.

School Nurses and On-Site Clinics

Comment: One commenter suggested eliminating the preamble language that describes school nurses and on-site clinics as acting as providers and subject to the privacy regulation, noting that this language is confusing and inconsistent with the statements provided in the preamble explicitly stating that HIPAA does not preempt FERPA.

Response: We agree that this language may have been confusing. We have provided a clearer expression of when schools may be required to comply with the privacy regulation in the “Relationship to Other Federal Laws” section of the preamble.

FERPA Generally

Comment: One commenter suggested adding a discussion of FERPA to the “Relationship to Other Federal Laws” section of the preamble.

Response: We agree and have added FERPA to the list of federal laws discussed in “Relationship to Other Federal Laws” section of the preamble.

School Clinics and “Treatment Records”

Comment: One commenter stated that school clinics should not have to comply with the “ancillary” administrative requirements, such as designating a privacy

official, maintaining documentation of their policies and procedures, and providing the Secretary of HHS with access.

Response: We disagree. Because we have excluded education records and records described at 20 U.S.C. 1232g(a)(4)(B)(iv) held by educational agencies and institutions subject to FERPA from the definition of protected health information, only non-FERPA schools would be subject to the administrative requirements. Most of these school clinics will also not be covered entities because they are not engaged in HIPAA transactions and these administrative requirements will not apply to them. However, to the extent a school clinic is within the definition of a health care provider, as Congress defined the term, and the school clinic is engaged in HIPAA transactions, it will be a covered entity and must comply with the rules below.

Record Access Rights

Comment: Several commenters expressed concern that the privacy regulation would eliminate the parents' ability to have access to information in their children's school health records. Because the proposed regulation suggests that school-based clinics keep health records separate from other educational files, these comments argued that the regulation is contrary to the spirit of FERPA, which provides parents with access rights to their children's educational files.

Response: As noted in the "Relationship to Other Federal Laws" provision of the preamble, to the extent information in school-based clinics is not protected health information because it is an education record, the FERPA access requirements apply and this regulation does not. For more detail regarding the rule's application to unemancipated minors, see the preamble discussion about "Personal Representatives."

With the guidance provided by both FPCO and HHS, an education record of a student in an Indiana public school will be governed by the considerations of FERPA⁷ and not HIPAA. This will be true of information generated by school nurses acting in this capacity, as well as information generated by state-mandated evaluations and screenings conducted pursuant to I.C. 20-8.1-7 *et seq.* HIPAA regulations specifically exclude from its definition of "protected health information" any education records subject to FERPA. See 45 CFR § 164.501.

⁷For students eligible for special education and related services under IDEA and 511 IAC 7-17 *et seq.* ("Article 7"), these additional confidentiality protections will also apply. IDEA incorporates FERPA by reference, 20 U.S.C. § 1417(c), but does have additional requirements.

SPECIAL CIRCUMSTANCES

HIPAA does apply to the following:

- (1) A Health Plan;
- (2) A Health Plan Clearinghouse; or
- (3) A Health Care Provider who transmits any health information in electronic form in connection with a transaction covered by HIPAA.

45 CFR § 160.102(a). Engaging in any one of these activities makes one a “covered entity” for the purpose of applying HIPAA requirements. 45 CFR § 160.103. Some public schools are certified as medicaid providers and have been providing services and billing for same. This may bring a public school within the definition of “Health Care Provider” for the purpose of complying with HIPAA for these transactions.

A public school corporation that participates in Medicaid reimbursement programs as a provider of services, bills for such services, and receives reimbursement for health-related services may very well be a “health care provider” under HIPAA if it “transmits any information in electronic form in connection with a transaction.”⁸ “Health care” is broadly defined to include “[p]reventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and ...[the] [s]ale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.” 45 CFR § 160.103. This definition is not exclusive. In essence, many services that might be included in a student’s Individualized Education Plan (IEP) for the delivery of special education and related services could also be “health care” services if the school actually bills Medicaid for health care services and does so electronically.⁹ Under this situation, it is likely the public school must comply with HIPAA.

In some circumstances, health care is provided on school grounds for the benefit of students but the health care is provided by a non-school entity, such as a community mental health center. The health

⁸Although Medicaid reimbursement is the example provided, a “transaction” under HIPAA is not restricted to Medicaid. Rather, it is defined as “the transmission of information between two parties to carry out financial or administrative activities related to health care” (with eleven delineated examples). 45 CFR § 160.103. That is, a public school corporation submitting a claim to a private insurance company, such as contemplated and permitted under 34 CFR § 300.142 of IDEA, is likely engaged in a “transaction” for HIPAA purposes and would have to comply with HIPAA.

⁹Such services could include, *e.g.*, assistive technology devices, audiology services, nursing services, interpreter services, occupational or physical therapy services, orientation and mobility services, speech-language services, and similar types of services.

records of students who receive these services will be retained by the health care provider and would likely be subject to the HIPAA privacy requirements.¹⁰

This memorandum is designed primarily to address current issues affecting publicly funded education with respect to the possible applications of HIPAA. Because HIPAA is a complex law and not within the responsibilities of the Indiana Department of Education, each public school corporation is responsible for determining whether some of its practices might invoke HIPAA, such as engaging in a HIPAA-type transaction through the billing for certain services. This memorandum represents our understanding as to how this law might and might not apply.

FOR MORE INFORMATION ON HIPAA...

The following web sites can provide additional information regarding HIPAA. These sites are provided only for informational purposes.

Indiana HIPAA Workgroup: www.Indianahipaa.org

Centers for Medicare and Medicaid Services: www.cms.hhs.gov/hipaa

Office for Civil Rights–HIPAA: www.hhs.gov/ocr/hipaa

Phoenix Health Systems: www.hipaadvisory.com

Bricker & Eckler: www.bricker.com/attserv/practice/hcare/hipaa

¹⁰It is possible that such records may be shared with school officials, in adherence with HIPAA privacy requirements, for educational planning purposes. When school officials receive the records for this purpose, the records will become “education records” for the school corporation’s purpose and be subject to FERPA privacy requirements. It does not appear that under this circumstance the HIPAA privacy requirements would continue to apply to records now in the custody and care of school officials.